



FSCO A15-000147

BETWEEN:

DAVID REEKS

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Barry S. Arbus, Q.C.

Heard: In person at Belleville, Ontario on February 19, 2016 and by written submissions completed on March 18, 2016

Appearances: Ms. Angela James for Mr. David Reeks
Mr. Sirius Biniiaz for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Mr. David Reeks, was injured as a result of a motor vehicle accident on October 8, 2010. The Applicant applied for statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm") payable under the *SABS*.¹ The parties were unable to resolve their disputes through mediation and Mr. Reeks, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

¹ *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The parties requested that this Hearing be restricted to one preliminary issue and the hearing of all other issues be postponed until determination of the preliminary issue.

The issue in this Preliminary Issue Hearing is:

1. Is Mr. Reeks precluded from proceeding with his claim for accident benefits due to his failure to submit a completed Application for Accident Benefits within thirty (30) days of receiving an Application for Accident Benefits package and his failure to provide a reasonable explanation?

Result:

1. The Applicant is precluded from proceeding to Arbitration by virtue of his failure to submit a completed Application for Accident Benefits within thirty (30) days of receiving the Application for Accident Benefits package and his failure to provide a reasonable explanation.

EVIDENCE AND ANALYSIS:

Background

The Applicant was involved in a motor vehicle accident on October 8, 2010 when, as a pedestrian, he was struck by a motor vehicle as he was crossing North Front Street in Belleville, Ontario.

There was some confusion as to whether the Applicant was insured at the time of the accident and on December 1, 2010, he notified Economical Mutual Insurance Company (“Economical”) that he would be making an Application for Accident Benefits. Economical provided the necessary Accident Benefits package, containing all applicable forms, for completion by Mr. Reeks on December 2, 2010.

On January 19, 2011, Baldwin Law, Mr. Reeks' counsel at that time, wrote to Economical advising them that Mr. Reeks was uninsured and they would be making an Application for Accident Benefits to Economical and requested the appropriate OCF forms. On February 9, 2011, Economical wrote to Baldwin Law advising that Mr. Reeks had a valid automobile policy through State Farm and confirming that on December 2, 2010, they had written to Mr. Reeks enclosing the appropriate OCF forms for completion.

Ultimately, State Farm assumed priority in this file from Economical. On October 5, 2012, an incomplete Application for Accident Benefits (OCF-1) was submitted by Baldwin Law on behalf of the Applicant to Economical; and on December 21, 2012, a signed and completed Application for Benefits (OCF-1), as signed by the Applicant, was submitted by Baldwin Law.

The Applicant's Position

The Applicant takes the position that Mr. Reeks ought not to be penalized for his delay in completion of the Application for Benefits as the Insurer did not provide sufficient information to assist him as is required by Section 32 of the *SABS*. The Applicant's counsel states that the Insurer did not promptly provide Mr. Reeks with the materials set out in Section 32(2). The Applicant further states that the Insurer should not benefit from its failure to assist the Applicant and the subsequent failure of the Applicant to submit a completed and signed Application for Benefits within thirty (30) days after receiving the forms, as is required by Section 32(5). The Applicant claims that he should be excused by virtue of his having a reasonable explanation as is contemplated by Section 34 of the *SABS*. The Applicant suggests that the Insurer had sufficient information to process the Applicant's claim. The Applicant relies on the Decision of *T.N. and Personal*,² where Arbitrator Bayefsky ruled that:

The delay in submitting an Application for Accident Benefits is only relevant to an insured's ability to mediate or arbitrate a claim. This determination turns on

² *T.N. and Personal Insurance Company of Canada* (Arbitration Decision of FSCO A06-000399, July 26, 2012).

whether the person provides the insurer with sufficient information to permit the insurer to commence the process of adjusting the claim.

The Applicant also states that *Cervo v. Raimondo*³ has no application to this case for two reasons: first, counsel claims that counsel had not been retained by the Applicant for the purpose of accident benefits but only for the purpose of tort; secondly, *Cervo* does not apply because Mr. Reeks was very confused as to his responsibilities and had been overwhelmed in the face of his serious injuries.

The Applicant's counsel also argued that Economical supplied the Applicant with a relatively complicated package, did not provide him with the information he required to assist him in applying for the benefits and did not advise him of the consequences of his failure to complete and send the completed Application for Benefits. The Applicant suggested that there is a positive obligation on the Insurer to ensure that the Applicant has sufficient information to enable him to apply for the benefits on a timely basis.

The Insurer's Position

The Insurer takes the position that Mr. Reeks has not provided a reasonable explanation for his failure to comply with the timelines prescribed in Section 32 of the *SABS* and, as such, should not be permitted to proceed with the Arbitration. The Insurer reiterated the facts set out above and reviewed the provisions of subsections 32(1), (2) and (5) of the *SABS*. The Insurer pointed out that Economical, in fact, enclosed an Accident Benefits Application package on a timely basis to the Applicant and this package contained all the necessary information which a normally-literate English-speaking adult could understand and appreciate. In addition, the Insurer points out that in their letter of December 2, 2010, they pointed out that failure to return the Application Package by January 4, 2011 might delay or jeopardize Mr. Reeks' benefits. The Insurer pointed out that despite providing Mr. Reeks with the Application Package as early as December 2010, no application was received for almost two years, until October 5, 2012.

³ *Cervo v. Raimondo*, 2006 Carswell Ont. 6735, 83 OR (3d) 205.

The Insurer relies heavily on the Court of Appeal Decision of *Cervo* which upheld the Motion Judge's refusal to relieve the Insured for failure to comply with the timelines prescribed in Section 32 of the *SABS*. The Insurer points out that the Court of Appeal in *Cervo* felt that depriving the Insured of his ability to receive accident benefits would not be sufficient rationale to overcome the burden set out in Section 34 of the *SABS*.

Analysis and the Law

Sections 32(1), (2) and (5), 34 and 55(1) of the *SABS* are the relevant sections requiring examination in this matter.

32. (1) A person who intends to apply for one or more benefits described in this Regulation shall notify the insurer of his or her intention no later than the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as is practicable after that day.
- (2) The insurer shall promptly provide the person with,
 - (a) the appropriate application forms;
 - (b) a written explanation of the benefits available;
 - (c) information to assist the person in applying for benefits; and
 - (d) information on the election relating to income replacement, non-earner and caregiver benefits, if applicable.
- (5) The applicant shall submit a completed and signed application for benefits to the insurer within 30 days after receiving the application forms.
34. A person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation.
55. An insured person shall not commence a mediation proceeding under section 280 of the Act if any of the following circumstances exist.

1. The insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or has not submitted an application for the benefit within the times prescribed by this Regulation.

The facts in this case clearly show that Economical, believing that Mr. Reeks was uninsured, provided the forms to Mr. Reeks within the time requirements of Section 32(1) and (2). They also, in their letter and in their teleconference with Mr. Reeks, advised him of the necessity to submit the forms within thirty (30) days after their receipt.

Section 34 of the *SABS* states that a person's failure to comply within the time limits does not disentitle them if the person has a reasonable explanation. The reasonable explanation provided by the Applicant's counsel is twofold. First, counsel claims that Mr. Reeks was confused and did not understand his obligation to complete these forms on a timely basis. Second, counsel claimed that although Mr. Reeks had retained counsel for his tort claim, no counsel had been retained for the accident benefit file.

I believe that Baldwin Law's letter to Economical of January 19, 2011 and Economical's subsequent response of February 9, 2011 negate these claims. Baldwin Law's letter specifically states, "This is written notice that Mr. Reeks will be making an Application for Accident Benefits to Economical Insurance. Kindly provide Mr. Reeks with the appropriate OCF forms." Economical's response of February 9, 2011 points out that Mr. Reeks has a valid automobile insurance policy with State Farm. Economical also points out that on December 2, 2010, it wrote a letter to Mr. Reeks enclosing the Application for Accident Benefits forms for completion and forwarding to the correct Insurer. Notwithstanding this letter, it was not until October 2012 when an incomplete application was submitted and December 21, 2012, when a properly completed Application for Benefits (OCF-1) was finally filed.

Justice Labrosse, in writing for the majority of the Court of Appeal in *Cervo*, stated in paragraph 46:

In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision and the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority.

Justice Labrosse also stated that the Insured's lack of sophistication would not be a relevant factor for consideration as you cannot distinguish the status of the client from the status of the solicitor.

The Applicant's reliance on Arbitrator Bayefsky in *T.N. and Personal* and the *McIntosh and Allstate*⁴ case can be distinguished in that in both those cases, the Insurer was provided with sufficient information to proceed with adjusting the claim. In this case, neither Economical nor State Farm heard anything from Mr. Reeks or his counsel from December 7, 2010 until October 5, 2012. I can also find no authority to support Mr. Reeks' counsel's contention that there is a positive obligation on the Insurer to remind the Applicant that he has not filed an OCF-1 on a timely basis.

Conclusion

In conclusion, I am satisfied that the Applicant has not submitted a completed and signed Application for Benefits within thirty (30) days after receiving the application forms as required by Section 32(5) of the *SABS*, nor has he provided a reasonable explanation for his failure to comply with the time limits set out as required by Section 34 of the *SABS*.

Accordingly, in accordance with Section 55 of the *SABS*, the Applicant shall not be entitled to commence mediation proceedings under the *Act*.

⁴ *McIntosh and Allstate Insurance Company of Canada* (Arbitration Decision of FSCO A02 B 001277, dated April 23, 2004).

EXPENSES:

In the parties are unable to agree on the entitlement to, or quantum of the expenses of this matter, they may schedule an expense hearing before me according to the provisions of Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Barry S. Arbus, Q.C.
Arbitrator

May 16, 2016
Date



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Applicant

and

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Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. The Applicant is precluded from proceeding to Arbitration by virtue of his failure to submit a completed Application for Accident Benefits within thirty (30) days of receiving the Application for Accident Benefits package and his failure to provide a reasonable explanation.

Barry S. Arbus, Q.C.
Arbitrator

May 16, 2016
Date